STATE OF MICHIGAN

COURT OF APPEALS

AMVD CENTER, INC.,

Plaintiff-Appellant,

v

CRUM & FORSTER INSURANCE,

Defendant-Appellee,

and

NORTH RIVER INSURANCE COMPANY,

Defendant/Cross-Defendant-Appellee,

and

MARK FEDERAU and OKEMOS AGENCY, INC., d/b/a FIRST FINANCIAL AGENCY, INC., and d/b/a FEDERAU GROUP,

Defendants/Cross-Plaintiffs-Appellees.

UNPUBLISHED
June 28, 2005

No. 252467
Calhoun Circuit Court
LC No. 00-002906-CZ

Before: Owens, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition to defendants pursuant to MCR 2.116(C)(7), (8), and (10), and the trial court's order denying plaintiff's motion for reconsideration of the earlier order. We affirm.

I

This case is the result of a June 25, 1998, fire that destroyed a building owned by plaintiff. Plaintiff's insurance policy for the building was issued by defendant North River, a subsidiary of defendant Crum & Forster. Defendant Federau and Okemos Agency are the agents through whom plaintiff applied for insurance. The policy covered all four buildings at the

destroyed building's physical location, and provided $25,000,000 building coverage with a 100% co-insurance requirement, and included the option of replacement cost coverage over and above actual cash value coverage. However, the replacement cost provision provides that the insurer will not pay a replacement cost claim until the property is actually repaired or replaced, and requires the repair or replacement to be made as soon as reasonably possible after the loss or damage, a provision specifically permitted by statute. MCL 500.2826.

After plaintiff made a claim for the loss of the building, North River calculated its actual cash value as $5,363,000, and paid plaintiff $5,338,000, which was the actual cash value less a $25,000 deductible.[1] At that time, North River notified plaintiff that if it elected to replace the building and claim its replacement cost coverage, a 40% co-insurance penalty would apply because North River determined that the building was underinsured.

Plaintiff did not replace the building, and filed suit against all defendants on July 24, 2000. Plaintiff claimed that its 1996 policy did not contain a co-insurance provision, and that it was unaware that the provision was subsequently added when it renewed the policies in 1997 and 1998. Plaintiff alleged that North River breached the insurance contract, and that Federau and Okemos Agency negligently procured the insurance and misrepresented the coverage. Plaintiff requested a declaratory judgment on the insurance policy, reformation of the insurance contract to comport to the terms of the 1996 policy, and damages in the amount of the building's replacement cost without applying co-insurance, minus monies already paid. The trial court granted summary disposition to North River pursuant to MCR 2.116(C)(7) and (8), and to Federau and Okemos Agency pursuant to MCR 2.116(C)(10). This appeal followed after the trial court denied plaintiff's motions for reconsideration.

II

Plaintiff argues that the trial court erred when it granted summary disposition to North River. We disagree. A trial court's decision on a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Under MCR 2.116(C)(7), summary disposition is proper when the "claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitation, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action." The contents of plaintiff's complaint must be accepted as true unless contradicted by admissible, documentary evidence submitted by the parties. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Plaintiff argues that it was unaware of the co-insurance provision contained in its policy, and that North River engaged in bad faith adjustment practices when it informed plaintiff that the co-insurance penalty would apply in the event that plaintiff chose to repair or replace the

[1] The trial court found as fact that the actual cash value of the loss was a negotiated figure and that plaintiff disposed of the insurance proceeds by paying off the mortgage on the property and making several loans to other corporations owned by Mr. VanDillen who also owned plaintiff corporation.

destroyed building. In support of its argument, plaintiff cites *Industro Motive Corp v Morris Agency, Inc*, 76 Mich App 390, 396-397, 256 NW2d 607 (1977), in which this Court held that an insurance carrier has a duty to bring any reduction in policy coverage to the insured's express attention. However, there was expert testimony that the 1997 and 1998 policies constituted an *increase* in coverage, if plaintiff made a timely repair or replacement of its fire-damaged property and further, that no coverage for replacement cost was available in Michigan without the requirement to repair or replace.

Although the record shows that the North River underwriter did not notify plaintiff about the change in coverage, it also shows that plaintiff was informed of the coverage it was to receive under its 1997 policy, which provided identical coverage to that under the 1998 policy. There was expert testimony that in a renewal situation, an insured would rely upon the expiring policy for the terms of the renewal policy. Thus, although plaintiff did not possess the 1998 policy binder at the time of the fire, it could rely upon the terms of the 1997 policy to ascertain the terms of the 1998 policy.

The law is well settled that an insured must be held to knowledge of the terms and conditions contained in his policy of insurance, even though he may not have read it. *Scanlon v Western Fire Ins Co*, 4 Mich App 234, 238; 144 NW2d 677 (1966); *Universal Underwriters v Van Kirk*, 26 Mich App 254, 259; 182 NW2d 354 (1970); *Russell v State Farm Mutual Auto Ins Co*, 47 Mich App 677, 679; 209 NW2d 815 (1973). In *Scanlon*, we noted,

> The fact that the plaintiff may not have read the printed conditions of his policy, and relied, in ignorance of them, upon the implied or assumed powers of the agent, cannot help him. It was his business to know what his contract of insurance was, and there can be no difference in this respect between an insurance policy and any other contract. In the absence of any fraud in the making of the same, and none is claimed in this case, the insured must be held to a knowledge of the conditions of his policy, as he would be in the case of any other contract or agreement. *Scanlon, supra* at 238.

Thus, plaintiff is bound by the terms and conditions contained in the 1998 policy.

Plaintiff also argues that it is entitled to reformation of its 1997 and 1998 policies to comport to the terms of its 1996 policy, which provided "agreed-value" blanket building coverage and did not contain a co-insurance provision. However, the record shows that plaintiff would not be entitled to any additional funds, under the 1996 policy, than those it has already received because that policy does not provide for replacement cost coverage and would only entitle plaintiff to an amount determined to be the actual cash value of the destroyed building. The record also shows that plaintiff's president signed a statement of loss agreeing to North River's calculation of the actual cash value of the destroyed building, and that North River has already paid that claim to plaintiff.

Plaintiff also argues that North River's adjustment precluded it from moving forward with replacement of the destroyed building, and that it is entitled to recover the replacement cost of the destroyed building, even though replacement has not taken place. In support, plaintiff cites *Pollock v Fire Ins Exchange*, 167 Mich App 415; 423 NW2d 234 (1988). In *Pollock*, this Court affirmed the trial court's award of replacement cost value to plaintiff, even though she did

not repair or replace the home, based upon defendant's obstruction of progress by refusing to deal with plaintiff before she contacted an attorney, by failing to appoint an appraiser after plaintiff requested they do so, by forcing plaintiff to bring the lawsuit, and by failing to make any substantial payment to plaintiff until twenty-five months after the fire. *Id*. at 421. This Court concluded that defendant's failure to pay the claim "hindered, and quite possibly even prevented," plaintiff from performing her obligation to repair or replace the building, and that this action by defendant constituted a lack of good faith in adjusting plaintiff's claim. *Id*. at 422.

Plaintiff contends that its situation is factually similar to that in *Pollock* because North River's notice to AMVD that the co-insurance penalty would apply effectively precluded AMVD from obtaining a loan to reconstruct the destroyed building. AMVD further contends that no lender would lend money for such a project where the insurance company would not reimburse the costs over and above the initial monies paid to AMVD.

We find that *Pollock* is inapplicable to the present case. In *Smith v Michigan Basic Ins Ass'n*, 441 Mich 181, 190-191; 490 NW2d 864 (1992), our Supreme Court held that where an insurance policy requires an insured to repair, replace, or rebuild its property as a condition precedent to receiving replacement cost coverage, the insured must do so to obtain such recovery. In so finding, the Court expressly stated, "*Pollock* should not be followed." *Id.* at 189. Further, plaintiffs' policy required that repair or replacement had to occur before plaintiffs were entitled to replacement cost coverage.

We also note that the insurance companies in both *Smith* and *Pollock* initially denied the plaintiffs' claims, and refused to pay anything to the insured. *Pollock, supra* at 415; *Smith, supra* at 184. Based upon the record, we are unconvinced that North River's notification that the co-insurance provision would apply to a replacement cost claim by plaintiff actually hindered plaintiff's ability to replace the property. The record shows that plaintiff's inquiries into whether it could obtain financing for the building's reconstruction were meager, and that no loan applications regarding any financing were ever completed. In addition, plaintiff's president signed a "Sworn Statement of Loss" that indicated his agreement that the building's actual cash value was $5,338,000, and that plaintiff spent nearly all of its actual cash value payment, instead of using it for the building's reconstruction.

We also find that the period of "reasonable time" for allowing AMVD to repair or replace the building under its replacement cost coverage claim has long since passed. The replacement cost provision of the policy provided that an insured notify North River of a replacement cost claim within 180 days of the loss, and required that the repairs or replacement be made "as soon as reasonably possible after the loss or damage." While plaintiff notified North River of its intent to rebuild within the required time period, it never commenced construction.

III

Plaintiff also argues that the trial court erred in granting summary disposition to Federau and Okemos Agency on its negligence and misrepresentation claims. We disagree. In a negligence action, a plaintiff must show that a defendant owed plaintiff a duty, that the defendant breached that duty, causation, and damages. *Case v Consumers Power Co*. 463 Mich 1, 6; 615 NW2d 17 (2000).

AMVD argues that a special relationship existed between it, Federau, and Okemos Agency such that they are liable to AMVD for failing to procure insurance coverage comparable to the AMVD's coverage before 1996. In *Bruner v League Gen Ins Co,* 164 Mich App 28; 416 NW2d 318 (1987), this Court stated that generally, an insurance agent has no duty to advise an insured about the adequacy of its policy coverage; however, such a duty may arise if a special relationship exists between the agent and the policyholder. *Id*. at 31-32. The Court stated that a special relationship required a long-standing relationship with interaction on the question of coverage and detrimental reliance by the insured on the agent's expertise. *Id*. at 34. More recently, in *Harts v Farmers Ins Exchange,* 461 Mich 1, 10; 597 NW2d 47 (1999), our Supreme Court modified the "special relationship" test as follows:

> the general rule of no duty changes when (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured. [Footnotes omitted.]

AMVD also cites *Mayer v Auto Owners Ins Co*, 127 Mich App 23, 26; 338 NW2d 407 (1983), in support of its argument that these defendants are its agent, rather than the agent of the insurer. However, the record does not support AMVD's reliance on *Mayer*. In *Mayer*, the insurance agent testified that he acted as the insured's agent. *Mayer, supra* at 26. The record shows that there is no such testimony by Federau, and that AMVD was aware that Federau is North River's agent.

In *Harts, supra* at 8-9, our Supreme Court stated,

> Thus, under the common law, an insurance agent whose principal is the insurance company owes no duty to advise a potential insured about any coverage. Such an agent's job is to merely present the product of his principal and take such orders as can be secured from those who want to purchase the coverage offered. Our Legislature also recognizes the limited nature of the agent's role. Those who offer insurance products have been regulated by statute in Michigan for at least 120 years, with insurance agents and insurance counselors being in fact subject to licensure before they can offer their services to the public. The most recent revisions to these regulatory statutes became effective in 1973. What is clear from these provisions is that the Legislature has long distinguished between insurance agents and insurance counselors, with agents being essentially order takers while it is insurance counselors who function primarily as advisors.

We find no genuine issue of material fact as to the existence of a special relationship between plaintiff and the Federau defendants. Plaintiff's assertion that such a relationship exists is unsupported by the record. Because we find that no special relationship exists between plaintiff and Federau/Okemos Agency, plaintiff's agency argument fails.

Plaintiff's complaint alleged that these defendants misrepresented the insurance coverage obtained, but does not specify whether the misrepresentation is fraudulent or innocent. The elements of fraudulent representation are: (i) the defendant made a material representation; (ii)

the representation was false; (iii) when making the representation, the defendant knew or should have known that it was false; (iv) the defendant made the representation with the intention that the plaintiff would act on it; and (v) the plaintiff acted on it and suffered damages as a result. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999). The plaintiff's reliance upon the representation must have been reasonable. *Id*. at 690. A claim of innocent misrepresentation is shown if a party to a contract detrimentally relied upon a false representation in such a matter that the injury suffered inured to the benefit of the party who made the representation. *Id*. at 688.

In this case any reliance by plaintiff was unreasonable. The record shows that the 1997 and 1998 policies issued to plaintiff were identical. In addition, as we have already mentioned, plaintiff had notice of the coverage provided by its 1997 policy at the time that it obtained that policy, had a duty to read its policy and raise any questions it had regarding the policy coverage within a reasonable period of time, which it did not do. Further, Federau was not notified of any changes to the policy upon its renewal in 1997. We also note that although plaintiff asserts on appeal that Federau assured AMVD that the full $10,200,000 would be available to rebuild the destroyed building, Van Dillen admitted that at the time of the fire, he knew plaintiff would have to rebuild, repair, or replace the building before it was entitled to replacement cost coverage. The record also shows that Federau made no independent decision as to the amount of coverage to procure for plaintiff, and therefore cannot be liable for misrepresenting the amount of coverage. Thus, we find that Federau and Okemos Agency cannot be liable for misrepresenting the type of insurance coverage procured.

Affirmed.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Janet T. Neff